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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO RODRIGUEZ-VERA,

Defendant and Appellant.

A151215

(Contra Costa County  
Super. Ct. No. 5-160646-6)

A jury convicted defendant Ricardo Rodriguez-Vera of four counts of making a criminal threat and assault with a deadly weapon. On appeal, defendant contends there was insufficient evidence to support one of the criminal threat charges, and the court erroneously admitted highly prejudicial evidence that he was associated with a gang member. We affirm.

**I. BACKGROUND**

On January 17, 2017, defendant was charged by first amended information with four counts of making a criminal threat (Pen. Code,<sup>1</sup> § 422, subd. (a); counts 1, 3, 6); one count of assault with a deadly weapon (§ 245, subd. (a)(1); count 5); and one count of unlawful possession of a firearm (§ 29800, subd. (a)(1); count 4). As to counts 1, 2, and 6, the district attorney alleged defendant used a knife in committing the criminal threats (§ 12022, subd. (b)(1)) and as to count 3, that defendant used a firearm (§ 12022.5,

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

subd. (a)). The information also alleged defendant had four prison priors. (§ 667.5, subd. (b).)

**A. *February 13, 2016***

R.T. lived with her then-husband, G.R., her children, and her grandparents in Bay Point. Freddie Talavera, a Sureño gang member, lived in the house next door. The area around Talavera's house was tagged with gang graffiti. G.R., R.T., and her grandparents had problems with Talavera, and had obtained a restraining order against him. R.T. testified she had seen Talavera and defendant tagging "the whole neighborhood" with gang graffiti.

In the early evening of February 13, 2016, R.T. and G.R. were moving cars in their driveway. Defendant and Talavera were hanging out in front of R.T.'s house. Defendant made vulgar sexual remarks to R.T., called her "that bitch," when talking to Talavera, and blew her kisses. R.T. told defendant to stop it. Defendant called R.T. names and threatened to slap her. At that point, G.R. came over to where R.T. was standing to pull her away. When G.R. came over, defendant became more aggressive. Defendant said, "South Side Locos, bitch," said he wanted to fight the couple, and said he could do whatever he wanted to them.

R.T. and G.R. backed away, and defendant pulled out a knife. He unfolded the blade, told the couple three or four times in English and Spanish that he was going to stab them, and made jabbing motions with his arm. G.R. heard defendant saying he was from "South Side" and saying the number "13." He took that to mean defendant would probably call his friends over to "mess with" the couple if things escalated. R.T. and G.R. took defendant's threats seriously, were very scared, and were worried defendant was going to stab them. The couple told defendant they were going to "call the cops" and went inside their house. At that point, defendant ran away.

G.R. continued to be worried about his and his wife's safety after the incident. He was concerned defendant knew where they lived and might come back.

### **B. March 13, 2016**

One month later, R.T. was inside her house when she heard her dogs barking. She went to the front yard and saw defendant standing in her front yard next to some big pipes. Talavera was standing in his front yard next door. R.T. asked defendant what he was doing on her property and asked him to leave. Defendant said he was looking for his pipe. R.T. told him none of the pipes belonged to him and defendant told her to mind her own business.

R.T.'s grandfather came out of the house and told defendant to leave. Defendant told the grandfather, "I have something for you, bitch." Defendant pulled out what R.T. thought was a gun and threatened to kill R.T. and her family. R.T. testified that defendant pointed the gun at her and her grandfather and she heard clicks each time defendant appeared to "click" the gun back.<sup>2</sup> R.T. thought defendant was going to shoot her and her grandfather. R.T. said the children were inside at the time, and she was scared not only for her own life but scared for her whole family.

When R.T.'s grandmother came out and screamed the police were on their way, defendant jumped over the fence toward Talavera's house and ran.

### **C. March 29, 2016**

M.M. lived with his parents in the house across the street from Talavera. M.M. testified Talavera had threatened the lives of people in the neighborhood and told them they should respect him because he was a gang member. M.M.'s family had called the police on Talavera multiple times and had obtained a restraining order against Talavera. M.M. had also seen defendant hanging out with Talavera multiple times over the course of four to six months, either outside or in Talavera's car in his driveway.

On March 29, 2016, M.M. was in the kitchen with his mother when he heard a loud commotion outside and looked out the window to see what was going on. M.M. saw defendant walking with a garbage can toward Talavera's house. M.M. went outside

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<sup>2</sup> R.T.'s grandfather denied that defendant pointed a gun in his or R.T.'s face. He also testified he saw something metal in defendant's hand, but could not identify the object.

and sat on a chair on his front porch. He heard Talavera and defendant arguing. Defendant began walking backwards toward the middle of the street. When defendant noticed M.M. sitting there he said, "Hey, cousin," in Spanish. M.M. looked at defendant and said, "Just keep walking."

Defendant put the garbage can behind M.M.'s mother's car and started up the walkway of M.M.'s house. M.M. stood up and told defendant multiple times to keep walking and get off his property. Defendant pulled out a pocket knife with a blade long enough to injure M.M. He opened the knife and lunged at M.M., swinging it twice at him. M.M. stepped back, fearing for his life. M.M. said defendant would have stabbed him with the knife if he had not moved back.

M.M. heard his mother inside calling the police. Defendant yelled, "Come on, come on." M.M. told defendant, "Come towards me." M.M. testified that although he feared for his life, he held his ground and hoped the police would soon arrive. Defendant stepped back toward the sidewalk and charged at M.M. again. M.M. stepped back again, and defendant stepped back as well. M.M. went into his house and defendant charged at him again, but when M.M. got inside he backed off.

A short time later, defendant returned alone and screamed, "Come on, come find me, I don't have the knife on me." M.M.'s mother held him back, while defendant screamed, "Come on, come on, I've killed people bigger than you." M.M. took defendant's words as a threat, understood him to be serious, and feared for his life and for his family. M.M. affirmed it was possible or likely defendant would cause him serious harm because he believed defendant was trying to engage him in the street. Though he could no longer see the knife on defendant at the time, he thought defendant would stab him because there "was no clear indication whether he did or did not have the knife on him."

When the authorities approached defendant, he took off running. The police found defendant. He did not have the knife on his person, but the police found it on top of the fence that backed up to Talavera's house. The knife was six to eight inches long when

opened. A surveillance video of the incident played for the jury showed that Talavera was outside in front of his house during much of the incident.

#### ***D. Expert Gang Testimony***

Concord Police Officer Glenn Provost testified as an expert in criminal street gangs generally and in the Sureño criminal street gang in Contra Costa County. Provost was familiar with Talavera, who he believed to be a Sureño gang member.

Provost testified about the Sureños, their activities, and their relationship to the Mexican Mafia prison gang. He explained their rivalry with the Norteños and their prison gang, Nuestra Familia, and described various subsets of the Sureños, including the South Side Locos in Concord.

Provost also explained the importance of graffiti or tagging as a means for gang members to identify their “turf” and intimidate people in the area to make them fear retaliation for cooperating with police investigations or otherwise interfering in the gang’s activities. He stated that “part of establishing the gang territory, so that the gang can operate is intimidating and terrorizing the neighborhood and normal people in the neighborhood as well.” Provost opined that gang members frequently retaliate and intimidate individuals who obtain restraining orders against them, and that one way to retaliate if a restraining order were in effect would be to have an associate act on the gang member’s behalf. In so doing, he explained, the Sureño may avoid violating the restraining order and make it more difficult for the police to arrest him. Provost also testified that sometimes Sureños commit crimes with nonmembers, including prospective gang members as well as friends or relatives who are not members. Even individuals who are not prospective gang members can gain benefits from hanging out with the gang, including gaining the respect of its members, avoiding harassment by the gang, receiving protection if they ever go to prison, or getting drugs or money.

#### ***E. Trial and Sentencing***

The jury convicted defendant on all four counts of making a criminal threat and the assault charge, and found true the knife enhancement allegations. Defendant was acquitted on the unlawful possession of a firearm charge and the jury found not true the

gun use enhancement allegation. The trial court found true the four prior prison allegations and sentenced defendant to an aggregate sentence of eight years eight months.

## **II. DISCUSSION**

### ***A. Sufficiency of Evidence of Criminal Threat***

Defendant contends his conviction for making a criminal threat against M.M. based on his statement, “I’ve killed people bigger than you,” must be reversed because there was insufficient evidence that the statement constituted a criminal threat.

“ ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, “we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.) Reversal for insufficiency of the evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

To sustain a finding that defendant made a criminal threat, the prosecution was required to show (1) defendant willfully threatened to commit a crime that would result in death or great bodily injury; (2) defendant made the threat with the specific intent that it be taken as a threat; (3) the threat, on its face and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat; and (4) the statement caused the person reasonably to be in sustained fear for his or her own safety or for the safety of his or her immediate family. (§ 422; *People v. Butler* (2000) 85 Cal.App.4th 745, 753.)

In evaluating whether words spoken by a defendant were sufficiently unequivocal, unconditional, immediate, and specific that they conveyed to the victim a gravity of purpose and immediate prospect of execution of the threat, we look to all the surrounding

circumstances and not just the words alone. (*People v. Butler, supra*, 85 Cal.App.4th at p. 754.) “Even an ambiguous statement may be a basis for a violation of section 422.” (*Id.* at p. 753.)

Here, sufficient evidence supports defendant’s conviction in light of the circumstances under which the threat was made. Defendant walked onto M.M.’s property, and when asked to leave, removed a six- to eight-inch knife and charged at him twice. M.M. testified that if he had not stepped back, defendant would have stabbed him. He also testified that he understood defendant’s words “I’ve killed people bigger than you” as a threat, that he feared for his life and his family, and that he thought defendant would stab him because he had attempted to stab him moments before and there was no clear indication whether defendant was still in possession of the knife when he made his statement. The totality of these circumstances, viewed in the light most favorable to the prosecution, support a finding the communication was sufficiently unequivocal, unconditional, immediate, and specific to convey a gravity of purpose and immediate prospect of execution.

In support of his argument the evidence was insufficient to constitute a criminal threat, defendant emphasizes that M.M.’s mother had to hold M.M. back on the porch, and that defendant was in the middle of the street and no longer holding the knife when he made the statement. However, it was not clear to M.M. that defendant was no longer holding the knife—he testified only that he could not see it at that time, but that he still feared being stabbed because there was no clear indication whether or not defendant still had the knife. The fact that only moments before defendant had charged at M.M. twice with the knife and almost stabbed him corroborates that fear. Further, the fact that M.M.’s mother held him back suggests she also took defendant’s threat seriously and found it sufficiently unequivocal to convey an immediate prospect of execution.

Finally, defendant argues the only reasonable inference to be drawn from the evidence was that his words were a boast to lure M.M. into the middle of the street to fight. We disagree. Defendant’s explanation that his words were merely a challenge to fight is one interpretation of the evidence. That circumstantial evidence might be

reasonably reconciled with defendant's innocence, however, is not the appropriate test on review. (*People v. Albillar* (2010) 51 Cal.4th 47, 60 ["If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding."].) Rather, we must consider whether any reasonable trier of fact could have found defendant guilty beyond a reasonable doubt. (*Ibid.*) On these facts, we conclude the evidence was sufficient to support the verdict.

### **B. Admission of Gang Evidence**

Defendant next contends his conviction must be reversed because the trial court abused its discretion in admitting irrelevant and highly inflammatory gang evidence. Defendant emphasizes no gang enhancements were charged in the case and no evidence was introduced that defendant was a gang member. He also argues the erroneous admission of gang-related testimony deprived him of his right to a fair trial and resulted in prejudice.

Before trial, the court considered the prosecution's motion in limine to admit gang expert testimony regarding Talavera's Sureño membership and the significance of the tagging on Talavera's house. The trial court ruled it would admit "the limited amount of gang evidence in this case" for proof of motive, given the evidence of association between defendant, Talavera, and the Sureños. The court restricted the gang expert testimony to general background information about the Sureños and the expert's knowledge (if any) that Talavera was a Sureño gang member. The court determined the gang evidence was "extremely probative in establishing the [section] 422 counts" because it "lends credence to the element of sustained fear [the victims] might have felt when threatened." The court also pointed to the fact that defendant did not commit the offenses in his own neighborhood, but went to Talavera's neighborhood and Talavera's home with gang signs tagged on it, as evidence "that he was doing these acts with a motive to increase the fear and intimidation he intended against the named alleged victims." The trial court ruled that the probative value of the evidence outweighed its prejudicial effect, but said the court would give a limiting instruction that the evidence be



used only for intent and motive, and not as evidence of bad character or predisposition to commit a crime.

The trial court also excluded evidence that Sureño paraphernalia or writings had been found on defendant while he was in custody. The court reasoned such evidence was not relevant because the prosecution was not arguing he was a gang member. Indeed, the court noted even if defendant admitted to being a Sureño, it would not be relevant to the charges. The court emphasized it wanted the gang evidence to be “curtailed” to motive and intent and did not want the gang testimony to be a “massive part of the trial.” Further, the court said, “[A]gain, we’re very clear that the defendant is not being accused of being a Sureño gang member. But like I said, the gang issue is inextricably wound up in the idea of motive and intent in this case, and I can’t separate them or explain it in any other way.”

In general, evidence is admissible if it is relevant and its probative value is not substantially outweighed by the probability that it will unduly consume time, “create substantial danger of undue prejudice,” confuse the issues, or mislead the jury. (Evid. Code, §§ 210, 352.) Courts recognize that gang evidence may have a “ ‘highly inflammatory’ ” impact. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Where no gang enhancement is involved “evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal.” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Nevertheless, gang evidence may be admitted in the absence of a gang allegation “if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative.” (*Samaniego*, at p. 1167.) “[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.” (*Hernandez*, at p. 1049.) We review a trial court’s admission of evidence, including gang testimony, for abuse of discretion. (*People*

*v. Avitia* (2005) 127 Cal.App.4th 185, 193; *People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225 [decision whether gang evidence is relevant and admissible rests within sound discretion of court].)

We find no abuse of discretion in the trial court’s decision to admit the gang evidence here. First, R.T. and G.R. testified defendant said, “South Side Locos” and “South Side,” during one of the criminal threat incidents. Provost’s testimony was relevant to explain what that meant. In addition, to convict defendant of making a criminal threat, the prosecution had to prove that defendant’s words and actions caused the victims to be in reasonable sustained fear for their safety or the safety of their families. (§ 422.) G.R. and R.T. testified they saw Talavera and defendant tagging the neighborhood with gang graffiti, and M.M. testified he saw defendant and Talavera together on multiple occasions at Talavera’s house and in his car over the course of four to six months. A victim’s knowledge that a person threatening violence is associated with a known gang member tends to support the conclusion the threat caused the victim to experience sustained fear. The gang testimony helped the jury understand the nature of the victims’ fear when harassed by defendant because of his connection to Talavera, whom they knew to be associated with the Sureños.

The evidence was also relevant because it had some tendency to prove motive—why defendant would threaten people he did not know. The victims, all neighbors of Talavera, had obtained restraining orders against Talavera. Provost explained that if a neighbor were to get a restraining order against a Sureño gang member, retaliation by the gang would be common. He also explained the gang member may turn to an associate to act on the gang member’s behalf, reducing the likelihood the gang member could be arrested or charged with violating the restraining order. Provost further testified about reasons nonprospective gang members may benefit from hanging out with gang members. Such evidence was relevant to help the jury understand why defendant might be motivated to continue the harassment of Talavera’s neighbors. Though not an element of defendant’s criminal acts, evidence of defendant’s possible motive was relevant to the jury’s determination of guilt. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 370

[though not an element of the crime, motive may be probative of, among other things, intent or the commission of the criminal act itself]; *People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1168 [probative value of motive generally exceeds its prejudicial effect and “ ‘ “wide latitude is permitted in admitting evidence of its existence” ’ ”].)

Further, defendant’s actions within the context of the victims’ harassment by Talavera was relevant to the jury’s assessment of the credibility of prosecution witnesses, including R.T., G.R., and M.M. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 869 [explanation for basis of witness fear is relevant to witness credibility and within discretion of trial court].) Those witnesses all testified that they took defendant’s threats seriously and were afraid. To that point, Provost explained that part of establishing the gang territory so that the gang could operate, involved “intimidating and terrorizing the neighborhood and normal people in the neighborhood as well.”

We also reject defendant’s argument the trial court erred by admitting the gang evidence because it was unduly prejudicial. The cases cited by defendant are distinguishable. In *People v. Albarran*, *supra*, 149 Cal.App.4th 214, the trial court allowed extensive evidence relating to the defendant’s gang, including the criminal activities of its members, death threats made to police officers by its members, and references to the Mexican Mafia. (*Id.* at pp. 227–228.) The court held that the extremely inflammatory evidence “was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran’s actual guilt.” (*Id.* at p. 228.) Here, by contrast, the trial court carefully limited testimony to general background information about the Sureños and Talavera’s membership in the gang. The jury did not hear any evidence about the gang’s activities, specific acts, Talavera’s involvement in a pending murder investigation, or indeed, evidence that defendant was found with gang-related paraphernalia or writings when he was in custody.

In *People v. Avitia*, *supra*, 127 Cal.App.4th 185, the defendant was charged with the negligent discharge of a firearm. The court allowed a deputy sheriff to testify that he saw gang graffiti on posters in the defendant’s bedroom. The defendant’s conviction was reversed on the ground that the gang evidence was irrelevant to any issue in the case. (*Id.*

at p. 193.) Here, however, the evidence of defendant's association with Talavera, a known gang member, was relevant to an element of the crime (the victims' sustained fear for their safety or the safety of their families), to defendant's motive for harassing people he did not know, and to the credibility of the victims' testimony.

The trial court thoughtfully analyzed the proffered evidence and explained on the record why the probative value of the evidence outweighed the prejudicial effect. It limited the scope of the gang testimony, and instructed the jury it could only use the evidence for the purpose of determining whether defendant had a motive to commit the crimes and for evaluating the credibility of a witness, but not to conclude defendant was a person of bad character or had a predisposition to commit the crimes. Its carefully considered decision was well within the bounds of reason.

In any event, even if the trial court erred in admitting the evidence, we conclude the error was harmless. The erroneous admission of evidence "results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Under state law, we "must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Ibid.*; *People v. Watson* (1956) 46 Cal.2d 818, 836.) For several reasons, we conclude the answer is no.

First, despite R.T.'s testimony that defendant pointed a gun at her and her grandfather and made clicking motions with the gun when he threatened them, the jury found defendant not guilty of possession of a firearm by a felon and found he did not use a firearm in committing the criminal threat against R.T. Those findings demonstrate the jury did not rush to judgment but was able to weigh the evidence without being unduly influenced by evidence Talavera was a Sureño gang member.

Second, as mentioned above, the trial court limited the jury's use of Provost's testimony to determining whether defendant had a motive for the crime, evaluating the credibility of witnesses, and considering the acts and information relied on by the expert witness in reaching his or her opinion. The court instructed the jury with CALCRIM Nos. 303 and 1403 that they were to use the gang evidence only for these purposes and

not to conclude that defendant was a person of bad character or predisposed to commit the crimes.

Third, the scope of the gang testimony was carefully restricted by the trial court to only general information about Sureños and Talavera's membership in the gang. Further, the prosecution explained Provost had been called to give "a little context" to the testimony about tagging and Talavera. The prosecutor repeatedly emphasized he was not arguing defendant is a gang member, no evidence had been presented that defendant was a gang member, and the jury did not have to find that defendant is a gang member. Rather, the gang evidence was relevant to the fear the victims felt, the motive defendant might have had for threatening the victims, and the meaning of his words when he was yelling "South Side" and "13" while threatening to stab them. Those statements from the prosecution reinforced the instructions of the trial court regarding the limited purpose for which the gang evidence was presented and could be considered.

Under these circumstances, we conclude it is not reasonably probable a more favorable decision would have been reached if Provost's testimony had been excluded.

### **III. DISPOSITION**

The judgment is affirmed.

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MARGULIES, J.

WE CONCUR:

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HUMES, P. J.

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BANKE, J.

A151215  
*People v. Rodriguez-Vera*